VIRGINIA LAW REGISTER

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Our New Associate.

As our readers have no doubt noticed, the name of Mr. Minor Bronaugh takes the place of Mr. S. B. Fisher as one of our associate editors. Mr. Fisher has retired from his connection with the Michie Company and moved to New York, where we have every right to believe his talent and industry will obtain for him a high position. Mr. Bronaugh, who succeeds him, has been with the Michie Company for some time and we have no doubt that our readers will find him measure up to the standard which the REGISTER has ever tried to maintain.

Professor Minor's Work on Government.

Any book which comes from the distinguished professor of law in the University of Virginia at once commands respectful and careful attention and at no time like the present has there been greater demand for some work on Government which in short compass can give a clear and distinct idea of great fundamental principles and acquaint the reader with the nature of our own government. In the present volume Professor Minor has given to the public not only a work carefully considered, pleasantly written and originally arranged, but the value of which can hardly be overestimated. Not since the lectures of Professor Tucker on the American Constitution—which should, by all manner of means, be republished under careful editorship—has there come from the University a book which gives to the careful reader an opportunity to become acquainted with the true and proper view of the relation of the States to the United States. Leading up to the discussion of this subject is

a concise account of the origin and nature of government, which, while brief, is comprehensive, entertaining and peculiarly useful for the student or busy man who wishes to obtain almost at a glance an excellent view of the origin of all government and the nature of each kind. Whilst discussing representative government Professor Minor makes an original and novel suggestion as to the formation of the upper house of the State Legislatures—a suggestion somewhat startling but worthy of consideration, though in the present temper of political thought in this country almost impossible of realization. He would give to the great interests, such as agricultural, commercial, manufacturing, laboring and educational, proportionate representation in the State Senates, making them representative of these great interests, while the lower houses would represent the numerical majorities of the people by districts. To carry this out there would have to be two registration books—one of the voters at large, the other of the voter classed according to his interest—as agriculturist, manufacturing, laborer, etc., etc. These classes should each have a certain number of Senators to be elected by the majority votes of the interests represented, thus making the lower house represent the people at large and the Senate the interests. At first glance the plan seems impossible and cumbrous, but on careful consideration it opens up a field of thought worthy of the attention of those who begin to see in the present mad rush for absolute control, by what they are pleased to call "The People," a danger to good government.

In his treatment of the respective rights of the general and State government Professor Minor, whilst fairly presenting both sides of the question, yet clearly evinces the view which should be expected of a professor of governmental law in the University founded by Jefferson. To any one reading between the lines it is clear that Professor Minor belongs to the school of Tucker, of Madison and Jefferson, and yet his manner of treating the whole subject is fair, original and founded upon undisputed and undisputable facts. The writer does not attempt to enforce strongly his own views upon his readers. He gives both sides an opportunity for individual judgments from the facts and arguments presented, from which we think any fair-

minded person can draw the conclusion of what our fathers intended this government to be, what it really was, and suggest what it ought to be. The note of warning sounded at the close of the volume is earnest, dignified and worthy of the attention of all lovers of our country. We congratulate both the learned author and the University upon this volume. We wish that it could be carefully read by every intelligent voter in this country, and we are happy to think that it will form the basis of instruction for those who in their formative period are to study the principles which are to fit them to become the future rulers of this country, where every man is in part a ruler in that he selects and holds responsible those who are to rule him.

We deem no apology necessary for making our review of this work an editorial instead of an ordinary book review, trusting that thus we may call greater attention to a work in every way worthy of the perusal of all interested in the important subject of which it treats.

The Evil of Many Laws.

We cannot forbear copying the most excellent article from the *Literary Digest,* which is, under the above title, published in the number of that excellent journal for October 4. We commend it to the serious consideration of our law makers. "The great American mania for lawmaking has about reached the limit of wasteful futility, according to a writer in the Chicago *Tribune,* but he sees no signs to indicate that our legislators, whether municipal, State, or federal, have any intention of stopping, even if they have reached it. About 100 new acts per day go into force in the various states and towns, he calculates, many of which are never enforced. In this average number he includes "only laws which affect a large territory and a large number of people," and does not take account of the many laws enacted by municipal bodies. The Illinois legislature is to be credited with a comparatively low record, the writer informs us, in having put its "solemn seal of approval," during the latest session, on "only about 250 pieces of legislation." Other State legislatures can boast a much better score, the bi-

ennial output of some of them amounting to 1,200 distinct acts. To the total of laws established by the legislatures must be added "the tremendous number of public—as opposed to private—acts passed by the Congress at Washington;" and, by way of illustration, the writer points out that from 1789 to 1874 a period of eighty-five years, the acts so passed fill seventeen bound volumes, while the statutes at large passed in the next twenty years fill sixteen volumes of the same size. No human intellect, he avers, can keep track of the new laws and the changes in the old ones "while the legislative sausage-machine is at work," and he quotes the opinion of a prominent lawyer, who says: "We have so many laws in this country that we have no law." Yet "the marvelous facility with which new laws are spawned," declares the *Tribune* writer, is not the worst of the matter, and he adds:

> "The bad quality of many of the laws passed by the average state legislature is even more conspicuous. And no wonder! An act written and introduced by one member is amended by two or three others, sent to the same house of the legislature, pawed over and amended there, sent back to conference, has paragraphs cut out and added, and, finally, is jammed through in the closing hours of the session in a form so changed and mutilated that its original sponsor would need an introduction. It is likely to be full of bad English, contradictions, prunes, and jokers. Various bar associations, after careful investigation, have reported that a large percentage of the laws passed by the average legislature may be fairly classified under one of the following heads:
>
> "1. Useless.
> "2. Carelessly worded.
> "3. Mischievous.
> "4. Bad."

It is almost the rule with any act passed by the legislature, the writer proceeds to say, that if one is sufficiently interested to pay for a careful search "some contradiction or error will be found because of which the courts will be obliged to declare it unconstitutional," while on the evil of unenforced laws he remarks:

> "It is a commonplace that the non-enforcement of certain

laws breeds disrespect for all law. Immigrants come here from countries where every law is enforced to the letter; where obedience to law is inbred and unbroken. They see their neighbors habitually and publicly breaking the law; they naturally conclude that they may with impunity break another law. It is another commonplace that when laws are left to be enforced at the discretion of the police force or of any other body of men the temptation to graft is great. A man would be more than human if he did not occasionally take advantage of the ever-present opportunity to punish an enemy or reward a friend. And shall not a friend who has received many favors now and then return the compliment."

And Yet—

Whilst we agree with all that is said in the preceding article we think there is much necessity for a good deal of new legislation in this State as well as revision of some of the old. For instance we would suggest to our Legislators to consider the wisdom of

First, regulating the law as to appeals in the matter of probate of wills and making the Statute of Limitations one year for an appeal both as to the clerk's office probate and probate in open court.

Second, devising some method by which depositions taken *de bene esse* can be so indexed in the orders as to be easily traced.

Third, allowing the Commonwealth at least one peremptory challenge of jurors impanelled to try criminal cases. The accused now has four—the Commonwealth none. To divide would be really the best method; but at least the Commonwealth should have one and the accused three.

Fourth, putting corporations on the same footing with private individuals as to the remedy by motion in cases of tort.

Fifth, devising some method of having practice and procedure in our courts simplified.

We have several others up our sleeve.

Trial by Jury Amongst the Nations of the World.

Very few laymen and fewer lawyers are aware of the quiet but good work which is being carried on by the International Law Association. The Congress of this Association met in Madrid on October 1st and held exceedingly interesting sessions. Amongst the reports submitted by various committees was one upon the subject of Jury Trial amongst civilized nations. This committee sent out questions to this country, Austria, Belgium, Canada, Quebec, Denmark, France, Germany, Holland, Italy, Norway, and Spain. These questions were as follows:

Are (a) civil cases (b) criminal cases, or (c) correctional cases tried with a jury, and is the jury regarded with favor? Of what number is the jury composed, and how is it selected? Has the defendant any right of challenge?

Answers were received from these countries and the results were summed up as follows:

The only country of those named in which all kinds of civil and criminal cases are tried by jury is the United States of America. In the province of Quebec, Canada, in civil and commercial cases where more than $400 is claimed, and in France in cases of compulsory purchase of land, where the amount to be paid to the person to be expropriated has to be assessed, a trial by jury may be had. In all the other eight cases juries may only be summoned in criminal cases, and in Spain this right is limited to very serious cases, ex. gr., sedition, murder, arson, forgery, etc. In eight of the countries the jury consists of twelve persons (reducible in the U. S. A. to six where the matter to be tried is of trivial importance), in the cases of Denmark and Holland no cases are tried by jury, although in the case of Denmark the jury in criminal cases will be introduced by a law taking effect in 1916, whilst in Norway the criminal jury consists of ten. There is in all the nine countries referred to in which they have juries some right of challenge, and the panel is selected either by some public official (like a sheriff), or by persons deputed for the purpose by the city or county councils, and the jurymen are selected from residents in the different districts, either townsfolk, land owners, or peasants. From the replies we have re-

ceived we gather that the system of trial of criminal cases by jury is approved of in Austria, Belgium, Canada, and France, whilst in Germany it is disliked by lawyers but approved of by the people, and in Denmark and Holland it is looked upon with disfavor. Owing to the prevalence of written instead of verbal proof in most continental codes of civil procedure, the jury appears to us to be unsuitable as the tribunal for the trial of civil cases, and, indeed, its place is supplied to a certain extent by the number of judges who sit for the trial of causes; speaking generally it is only under systems framed upon the English model of civil procedure in which the jury can usefully find a place. Whether it is a desirable institution in all criminal cases must depend so largely upon the sentiments and traditions of the people that we feel we are not justified in expressing an opinion as to the desirability of its universal application. We wish, however, to point out that in Spain—as has been found to be the case in Ireland in cases with a political aspect—jurors are apt to take a perverted or over lenient view of the crime imputed to the prisoner or of the motives of the prosecution.

Decisions by Our Supreme Court of Appeals at the Staunton, September 1913 Term.

The decisions handed down at the September Term are nearly all of cases heard at Wytheville and we note with regret that the learned President of the Court took no part in them, being absent at the hearing, and with equal regret we note the absence of J. J. Whittle and Buchanan from some of them. The decisions handed down are in several cases of distinct novelty and interest. We note with much pleasure that in the case of Mullins *v.* Commonwealth, decided September 11, 1913, the Court follows Shiflett *v.* Commonwealth, 114 Va. 876, and holds that improper averments in indictments will be treated as surplusage where the residue of the allegations sets out the offense charged in technical language and with substantial certainty and precision; and whilst this has been the case since Pomeroy *v.* The Commonwealth, 2 Va. Cases 342, yet the present Court seem

to have broadened and taken a wiser and more sensible view of the whole matter. Indeed we may say of the present court that it has done more to clear the atmosphere in criminal procedure than any other Court in the history of the Commonwealth. It has zealously guarded the rights of the prisoner but has not been insensible to the rights of the Commonwealth. The refusal of writs in the McCue and Allen cases evinced a stern sense of justice in the administration of which no legal quibbles were allowed to interfere. And time and again the Court has made it evident that justice was far more important in the trial of criminal cases than mere form.

In the matter of reversals for giving or refusing instructions the Court has also of late done much to aid the lower courts in this wretched system which is a blot on our jurisprudence and has probably caused more expense and miscarriage of justice than anything else in our practice—Common Law pleading not excepted. In Draper *v.* The Commonwealth, September 11, 1913, the Court sustained the refusal of one instruction, which under the Burton Case, 109 Va., page 800, might have been construed as tending to show that the wife was not in necessitous circumstances, i. e., supporting herself by her own labor, and yet the giving of which would have possibly caused the greatest injustice. In Nesbitt *v.* Webb, September 11, 1913, the Court again sets its face against the multiplication of instructions and reiterates the doctrine that when the jury has been by instructions abundantly and liberally given the law upon every phase of the case the refusal of the Court to give other instructions, even though pertinent, is not error. In Virginian Railroad *v.* Bell the lower court was reversed because the Court did not properly instruct the jury upon the question of contributory negligence. When will we ever reach the happy conclusion to which the English courts have long years ago come that the judge should charge the jury and give them the law in his own way and not in the disjecta membra which are now thrown at them framed too often to confuse and intended to serve as the basis of an appeal.

In Lunsford's Administrator *v.* Colonial Coal & Coke Company, decided at the same term, the Court affirms its decision in Walker *v.* Potomac Railroad Company, 105 Va. 226 (Turn-

table Case), but we cannot agree with the Court that the facts in the Lunsford Case justify the decision, but then we have never agreed that Virginia took the right view of the Turntable Case, and as our associates will probably in a later number annotate this case, we leave it for their discussion.

Aerial Navigation.

It would seem that our courts must at no distant time determine the status in Virginia of that maxim of the common law: *Cujus est solum ejus est usque ad cœlum,* for aviation has passed beyond the experimental stage and is now an assured fact. Many states, notably Connecticut and Massachusetts, already have statutes dealing with the subject, and providing for licensing the aeronaut and registering the machine. Will our court repudiate this maxim as the creation of black-letter lawyers, and arguing ex necessitate rei, allow the fledgeling birdman to invade our cœlum at will, or adhere to first principles and recognize this maxim as one of the canons of real property, not to be lightly repudiated? Any other course than a complete recognition of the subjacent proprietor's ownership usque ad cœlum will be judge-made law pure and simple. Projecting cornices (Fay *v.* Prentice, 1 C. B. 822), stringing wires and firing guns over another's land (Clifton *v.* Bury, L. T. N. S. 8; Whittaker *v.* Stangvick, 100 Minn. 386, 111 N. W. 295; Board of Works *v.* Tel. Co., 13 Q. B. D. 904), and overhanging branches of trees (Skinner *v.* Wilder, 38 Vt. 115, 88 Am. Dec. 645), have all been regarded as technical trespasses, rendering the defendant liable for at least nominal damages, and by analogy any other invasion of the superjacent atmosphere should be so regarded. Lord Ellenborough held in Pickering *v.* Rudd, 4 Camp. 219, in language which seems almost prophetic in light of present developments, that an action would not lie against the defendant for nailing a board on his wall so as to overhang the plaintiff's close, "otherwise an aeronaut would be liable to an action of trespass quære clausum fregit at the suit of the occupier of every field over which his balloon passed in the course of his voyage." But this dictum of Lord Ellenborough was questioned fifty years later

in Kenyon *v.* Hart, 6 B. & S. 249, by Lord Blackburn, in which he said, in referring to this opinion of Lord Ellenborough, that he "understood the good reason of the doubt, though not the legal reason of it," and this opinion of Lord Blackburn seems the better view. To say that no substantial damage results from merely flying over another's premises is aside from the question, and moreover, if damages will not compensate, equity will enjoin such repeated trespasses. But it is not true that no real damage accrues though the aviator does not alight or otherwise touch the premises, for, as was held in the New York Elevated Railroad cases, it constitutes a taking to invade one's right of privacy, and if the owner chooses to appear on his roof in his robe de nuit why shouldn't he exercise this privilege without fear of invasion from the chance birdman who may happen across.

In Germany, Switzerland, France and other European countries the question has been put at rest by legislation substantially providing that the subjacent proprietor may not complain of a flight over his premises at such a height that he has no interest therein, but in those countries that have adopted the common law it would seem that the courts must rest squarely on this maxim, which many have declared, however, to be of doubtful authenticity, and like every definition of a complex right must be taken with limitations.

The English Parliament was the first of any of the great legislatures of the world to enact any law controlling the right of flying. An act was rushed through within the remarkable space of two weeks, its main object, it is said, being to protect the procession in connection with the coronation of George V from the danger of reckless aviators. That act gave to the Home Secretary the very largest powers for interdicting flying over any area whatever and whenever he thinks fit to exercise it. This act seemed to provide primarily for the safety of the public; on the Continent the reverse is the case. There the aviator is encouraged, following, we suppose, the Parisian rule, where the foot passenger is punished if he allows a cab to run over him. The English have in the present year passed another act assuming full sovereignty rights, and recent legislation in France and Russia rests on the same assumption; while the France-German

Convention regulating air traffic, which has been stated to have been concluded within the last three months, admits full sovereignty rights but authorizes civil aerial circulation in each country subject to certain conditions and allows each country the right to make such regulations as it pleases relative thereto. The English Common Law, which also obtains generally in our country, has never been changed by any act or decision that we are aware of in regard to private rights in the air. The Common Law rule is embodied in the Code Napoleon, in the Codes of Germany, Switzerland, Italy, the Netherlands, Belgium, Spain, Portugal, Austria, Japan, Turkey, and the State of Connecticut has a statute on the subject. This is a plain indication that the principle of State sovereignty over the whole air space has been generally recognized by civilized nations, for of course the admission of the rights of private owners *'usque ad cœlum'* involves the assertion of State sovereignty to the same extent. And yet it seems to be the general opinion that all proper encouragement ought to be given to those who are developing this new art and we do not think there is any reason to anticipate that states will interfere with the passage of foreign air ships through the air above their territories in an unreasonable manner, any more than they have interfered with the passage of foreign vehicles through their territories, or of foreign vessels through their territorial waters. Indeed any action of this character must necessarily be prevented by considerations of reciprocal interest. But the great question is, admitting all the rights of private persons in the entire firmament above their land, how can any statute be passed which can control the birdman if he chooses to "fly high." So far all these questions are absolutely in the air.